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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

Nos. 373-385

GEORGE WHITNEY,

Petitioner,

—against—

COMMISSIONER OF INTERNAL REVENUE,

Respondent,

and 12 Consolidated Cases.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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COMMISSIONER OF INTERNAL REVENUE,

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PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the United States:

The petitioners in these 13 consolidated cases pray the issuance of writs of certiorari to the United States Court

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[1] *Henry C. Alexander* v. *Commissioner; Arthur M. Anderson and Alice M. Anderson, Husband and Wife,* v. *Commissioner; I. C. Raymond Atkin and Winnifred Atkin, Husband and Wife,* v. *Commissioner; Henry P. Davison* v. *Commissioner; Charles D. Dickey and Catherine C. Dickey, Husband and Wife,* v. *Commissioner; Thomas S. Lamont* v. *Commissioner; Estate of Thomas W. Lamont, Deceased, Florence C. Lamont, Thomas S. Lamont and J. P. Morgan & Co. Incorporated, Executors,* v. *Commissioner; Russell C. Leffingwell and Lucy H. Leffingwell, Husband and Wife,* v. *Commissioner; William A. Mitchell* v. *Commissioner; Estate of J. P. Morgan, Deceased, Junius S. Morgan, Henry S. Morgan and J. P. Morgan & Co. Incorporated, Executors,* v. *Commissioner; Junius S. Morgan and Louise C. Morgan, Husband and Wife,* v. *Commissioner; Estate of Frances D. Bartow, Deceased, J. P. Morgan & Co. Incorporated, Executor, and Sabina R. Bartow, Wife of said Francis D. Bartow,* v. *Commissioner.*

of Appeals for the Second Circuit to review the judgments and decisions of that Court rendered on August 11, 1948, in so far as such judgments and decisions held that certain losses admittedly sustained on the sale of certain assets by the firm of J. P. Morgan & Co. to a newly incorporated New York trust company are not allowable for income tax purposes under Section 24(b)(1)(B) of the Internal Revenue Code, which judgments and decisions reversed a unanimous decision of the full Tax Court of the United States promulgated on May 14, 1947.

The cases were consolidated for trial in the Tax Court, and were consolidated for hearing and decision in the Court below.

Summary Statement of Matter Involved

The facts are not in dispute. For over 80 years the firm of J. P. Morgan & Co., a New York partnership, was engaged in a general banking business, in New York City under the name of J. P. Morgan & Co. and in Philadelphia under the name of Drexel & Co. In the latter part of 1939 the partners (the 13 petitioners in these consolidated cases) decided, for reasons which have nothing to do with the controversy here involved, to incorporate the New York business as a trust company, and arrangements to that end—which involved also the complete separation of the Philadelphia business—were completed in March, 1940. A trust company was duly organized under the laws of New York, called "J. P. Morgan & Co. Incorporated". On March 29, 1940, in accordance with the requirements of Section 93 of the New York Banking Law, the stock of the trust company was issued for cash, the petitioners acquiring 72.9%, relatives of such petitioners 5.3%, and persons wholly unrelated to the petitioners 21.8% (R. 8a-9a). The firm of J. P. Morgan & Co. did not subscribe for, purchase or at any time own any of the trust company's stock.

Following the issuance of the new trust company's stock for cash and the receipt of the official authorization

certificate to do business, on March 30, 1940 (which was a Saturday), the new trust company under a formal Bill of Sale and Agreement (R. 224a) purchased the assets of the firm of J. P. Morgan & Co. at current market values, assumed the liability obligations of the firm, all as set forth in the Bill of Sale, and paid to the firm $12,265,394.09 in cash (in the form of a check payable to the firm and deposited by the firm in the firm's account with The National City Bank of New York), representing the difference between the agreed value of the assets sold and the amount of the liabilities assumed. The Bill of Sale recited that "Whereas, the Firm * * * now desires to sell to the Bank its banking business * * *" and "the Bank * * * desires to purchase the assets, rights and properties hereby sold to it", and provided that "The Firm and each of the Partners, respectively, hereby sells * * * to the Bank" the firm assets, rights and properties, as detailed by schedule. Following the closing under the Bill of Sale on March 30, 1940, the firm was liquidated and dissolved and its affairs were wound up by settlement with the several partners. On Monday, April 1, the new trust company opened for business and has since been carrying on business.

The assets which were the subject matter of the sale between the firm and the trust company consisted only of firm assets dedicated to the business of the firm, and the Tax Court and the Court of Appeals expressly so found (R. 22a, 259a).

Among the assets sold were the firm's investment securities, some of which showed capital gains on the sale and some of which showed losses. The amounts of the capital gains and losses are not in dispute. The short- and long-term gains taken into account aggregated $1,835,571, and the short- and long-term losses taken into account aggregated $2,829,239 (R. 9a). Under Section 182 of the Internal Revenue Code applicable in 1940 (see Appendix), a partner in computing his net income is required to include in his individual income tax return his distributive share of the

partnership capital gains and is entitled to deduct his distributive share of the partnership capital losses. In auditing the individual returns of the several partners for 1940, the Commissioner taxed the distributive share of the partnership gains but disallowed the losses, and found deficiencies which, with interest, aggregate $1,132,189. The losses were disallowed solely on the ground that the sale giving rise to the losses was a sale "between an individual and a corporation" within the meaning of Section 24(b)(1)(B) of the Internal Revenue Code.

The Tax Court, acting *en banc*, with none of the Judges dissenting, held that Section 24(b) did not apply and allowed the losses (R. 21a-29a). The Court of Appeals reversed and sustained the Commissioner (R. 274a).

Basis of Jurisdiction

The judgments of the Court below were entered on August 11, 1948 (R. 275a-300a). The jurisdiction of this Court is invoked under Sections 1254 and 2101 of the Judicial Code effective September 1, 1948 (28 U. S. C.).

Questions Presented

1. Is a New York partnership formally organized and operating under written articles of partnership with a stated capital and engaged in carrying on an extensive banking business including the receipt of large deposits—a genuine and in no sense a pretended business enterprise—"an individual" within the meaning of Section 24(b)(1)(B) of the Internal Revenue Code?

2. Was it the intention of Congress, under a statute taxing the gains on a sale by "an individual" but disallowing the losses, to reach the partnership form of business?

3. Are the rights of a partner in the firm assets (within the intendment of the tax laws) such that the several partners can be said to own individually the firm assets, or are

the rights of the partners limited to having the firm assets devoted to firm business, and to sharing in any profits which such assets produce and in any surplus upon final winding up?

4. Did the Court of Appeals have power to reverse the unanimous decision of the Tax Court, when such decision had warrant in the record and a reasonable basis in law?

Reasons for Allowing the Writ

1. ***Under the decision of the Court below two important questions of Federal law arise which have not been, but should be, settled by this Court.***

(1). For 15 years the problem of the true status of a partnership for tax purposes has vexed the Bar, the Bench and the Treasury alike. While the factual background varies from case to case, the ultimate question—still unanswered—is invariably the same, regardless of the character of the particular tax controversy: Do the partners own the firm assets individually; or is the partnership to be regarded for tax purposes as a separate business entity, with each partner entitled only to have the firm assets devoted to the firm business, to his share in the earnings and in any surplus on liquidation? Although the latter view has largely prevailed in the courts, the Commissioner has stubbornly adhered to the individual ownership theory. Hence, the extensive litigation that has pursued this question from the outset.

On May 17, 1948, the controversy over this question appeared at last to have come to an end. On that date this Court denied certiorari in the case of *Commissioner* v. *Lehman*, 165 F. (2d) 383 (1948), wherein the Court of Appeals for the Second Circuit (speaking through Judge Learned Hand) overthrew the Commissioner's contentions and held that (at p. 385)—

> "while the firm never became a jural person, capable of being sued and of suing as such, in the administration of its affairs it did become for most purposes an entity;

> and it was upon this traditional structure that Congress fitted the taxation of partnerships * * *."

The settlement of this long-standing controversy was short-lived. Within eight months a different bench within the Second Circuit has now in this case squarely repudiated the *Lehman* decision. Judge Clark now holds that (R. 268a)—

> "Basically, the tax law adopts the common-law concept of the partnership as an aggregate of individuals operating the properties of the partnership enterprise as co-owners."

It is impossible to reconcile the opinion in the *Lehman* case with the view now adopted by Judge Clark. The two decisions are fundamentally and diametrically opposed.

In this state of the decisions, what guiding principle is the Commissioner to follow in partnership cases, and how can taxpayers properly make returns with any assurance of complying with the law? With a large part of the country's business conducted in partnership form, the question here presented arises with a frequency that is as disturbing as it is unavoidable. Virtually every partnership at some point or another must meet it head on. As in the case of a conflict in circuits, authoritative guidance from this Court is imperative, if the existing confusion resulting from these two diametrically opposed decisions is not to be worse confounded.

(2). In overruling the expert opinion of a unanimous Tax Court, the Court of Appeals plainly violated the rule of *Dobson* v. *Commissioner*, 320 U. S. 489 (1943). This decision was predicated upon the language of Section 1141 (c)(1) of the Internal Revenue Code, which, under the caption "Powers", provided—and still provides—that the Courts of Appeals may modify or reverse "if the decision of the Board is not in accordance with law".

Effective September 1, 1948—after the decision of the Court of Appeals in this case was handed down and judgment entered—Congress amended, not Section 1141(c) but Section 1141(a), which relates to the *jurisdiction* of the

reviewing court and not to the *scope* of its review (P. L. 773, 80th Cong., 2d Sess., §36). The amendment reads as follows:

> "The circuit courts of appeals and the United States Court of Appeals for the District of Columbia shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in section 1254 of title 28 of the United States Code, *in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury;* * * *." (Italicized clause added by amendment.)

Accordingly, two questions of primary importance arise: First, does the new legislation apply to a case in which the decision of the Court of Appeals was handed down and judgment entered prior to the effective date of the new law? Second, if the amendment does apply in such a case, to what extent does it affect the *Dobson* rule? In view of the innumerable cases which have been decided on the basis of the *Dobson* rule within the past few years, the importance of deciding these questions at this time can hardly be disputed.

2. *The decision below is believed to be in conflict with the applicable decisions of this Court.*

In holding that "the partnership [is] an association of individuals who are co-owners of its specific property", the Court below disregarded the decisions of this Court in *Case* v. *Beauregard*, 99 U. S. 119 (1879), and *Blodgett* v. *Silberman*, 277 U. S. 1 (1928), wherein this Court expressly held that partners are not the individual owners of the partnership's property. In the *Beauregard* decision, long recognized as a landmark in the law of partnerships, this Court stated (99 U. S. at 124):

> "No doubt the effects of a partnership belong to it so long as it continues in existence, and not to the individuals who compose the firm. The right of each partner extends only to a share of what may remain after payment of the debts of the firm and the settlement of its accounts."

The *Silberman* case applied this principle. In view of the rights and limitations imposed upon a tenancy in partnership this Court, speaking through Chief Justice Taft, concluded that the right of a partner is nothing more than the right "to share in what would remain of the partnership assets after its liabilities were satisfied" (277 U. S. at 11). On this reasoning the Court held that Connecticut could impose an inheritance tax on a Connecticut resident in respect of his partnership interest in a New York partnership which owned, among other things, New York real estate, even though such real estate if owned directly was beyond the power of Connecticut to tax.

3. ***The decision below has construed Section 24(b)(1)(B) in a manner so novel as to call for review by this Court because of the far-reaching consequences of such construction.***

In holding as it did that a partnership is "an individual" within the meaning of Section 24(b)(1)(B), and thus exposed to the harsh rule that gains on a sale are taxed while losses are disallowed, the Court below announced a principle which will seriously prejudice the legitimate freedom of action of business partnerships in changing the form of their business.

For example, a banking business carried on in corporate form may sell its assets to a new bank or trust company having the same stockholders, thus resulting in the retention of control over the assets sold, and yet not run afoul of Section 24(b), since the section concededly does not apply to a sale made by one corporation to another corporation, save in the narrow case where one is a personal holding company. Likewise a banking business in partnership form may sell its assets to another and separate banking partnership composed of the same or somewhat different partners, again resulting in the retention of control over the assets sold, without incurring the penalty of Section 24(b). Yet under the decision below a banking partnership cannot sell its assets to a new banking corporation

in which the partners retain control, without subjecting the partners to this penalty.

A sale between two corporations is quite secure, and a sale between two partnerships is quite secure, even though in both instances there is a retention of control over the assets sold. But a sale by a partnership to a corporation or by a corporation to a partnership exposes the partners or the corporation, as the case may be, to a tax on the gains and a disallowance of the losses. When complete freedom of action is accorded the first two kinds of transaction, it is utterly inconceivable that Congress intended to burden so drastically a sale between a partnership and a corporation, whether occurring in the process of incorporating the business or in the ordinary course of business.

The decision below is as novel as it is far-reaching, and clearly calls for review by this Court.

Prayer

For the foregoing reasons, which are developed in more detail in the accompanying brief, your petitioners pray that writs of certiorari issue out of this Court to the United States Court of Appeals for the Second Circuit, and that the duly certified copy of the transcript of the proceedings below and the printed appendix which accompany this petition shall be treated as though filed in response to the aforesaid writs to the end that these cases may be reviewed and determined by this Court; that the judgments and decisions of the Court of Appeals be reversed; and that your petitioners be granted such other and further relief as may be proper.

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New York, N. Y., October 28, 1948.

BRIEF IN SUPPORT OF PETITION

Opinions Below

The opinion of the Tax Court is reported in 8 T. C. 1019 and appears at R. 6a-31a. The opinion of the Second Circuit Court of Appeals is reported in 169 F. (2d) 562 and appears at R. 257a.

Jurisdiction of this Court

This is set forth at p. 4 in the preceding petition under the heading "Basis of Jurisdiction".

Statement of the Case

This is stated in the petition at pp. 2-4 under the heading "Summary Statement of Matter Involved".

Statutes Involved

The statutes involved are set forth in an appendix attached to this brief.

Specification of Errors to be Urged

The Court of Appeals erred

(1) in holding that the sale of partnership assets by the partnership of J. P. Morgan & Co. to the new trust company was a sale by "an individual" within the meaning of Section 24(b)(1)(B);

(2) in holding that the legislative history of Section 24(b)(1)(B) shows that the word "individual" was intended to include a partnership, when the legislative history indicates quite the contrary;

(3) in applying to a modern partnership under the Uniform Partnership Act the now outmoded theory of the common law that partners own the firm assets individually, as in the case of joint owners who are not partners;

(4) in reversing the unanimous decision of the Tax Court, when that decision had warrant in the record and a reasonable basis in law.

Preliminary Statement

The Court below spoke of the "legal device of the partnership" and its "interposition" to bring about the allowance of tax losses, and made much of what it called "the more spectacular cases" brought out by the investigations of the Senate Committee on Banking and Currency in 1933. The implications are without warrant.

This is not a case of the use of a partnership as a device. The Commissioner made no such implication. The Tax Court did not. The firm of J. P. Morgan & Co. was formed and doing an extensive business many years before the income tax laws were enacted. The reasons for incorporating the business were business reasons and had nothing whatsoever to do with income taxes or their avoidance, and any implications to the contrary have no place whatsoever in this case.

As to the Senate Committee's investigation, the record of the hearings and the accompanying report, as we point out hereafter, show that there was not one single instance cited or discussed which would indicate that the investigating committee was either interested in or considering the disallowance of a loss on a sale by or to a partnership.

ARGUMENT

POINT I

The Court below erred in holding that the partnership of J. P. Morgan & Co. was "an individual" within the meaning of Section 24(b)(1)(B).

There is not a particle of justification in the statute for wrenching the word "individual" out of its usual sense and construing it to include a partnership. Though the term "individual" is not defined in the statute, the distinction between an "individual" and a "partnership" is carefully preserved throughout. See Sections 107, 143, 181, 187, and 211(b), and especially Section 24(b)(2), which makes frequent use of both "individual" and "partnership" but in

such a manner that in not one instance is it possible to substitute "partnership" for "individual", or "individual" for "partnership", without destroying the sense of the passage. Indeed, there is not a single instance in our revenue laws where the word "individual" includes a partnership. If Congress had so intended in Section 24(b)(1)(B), it would have said so.

Perhaps the most explicit—if not compelling—evidence that Congress does not regard a partnership as an individual is contained in Section 503(a)(1), which sets forth the rules for determining the ownership of stock in a personal holding company—rules which are identical with the rules for determining the ownership of stock in Section 24(b)(2)(A). Under the descriptive caption "Stock not owned by individual", appears the following: "Stock owned, directly or indirectly, by or for a corporation, partnership, estate, or trust * * *." Here is a clear declaration in the statute itself that a partnership is not an individual. This declaration applies with equal force to Section 24(b), for the purpose and the wording of Section 503(a)(1) are identical with the purpose and the wording of Section 24(b)(2)(A).

As the petition points out (p. 8, *supra*), it is quite unreasonable to ascribe to Congress an intention to classify a partnership as an "individual" under Section 24(b) and so impose a penalty on a sale or exchange between a partnership and a corporation, when concededly a sale between two corporations or between two partnerships, regardless of continued control, is outside the statute. Yet, if the construction of Section 24(b) adopted by the Court below stands, there is no escape from this unwarranted discrimination. The non-recognition provisions of the statute afford no relief, or at best inadequate relief. The only applicable section, Section 112(b)(5), requires an "exchange" of securities for property pursuant to a plan, a retention of 80% control in the transferors and a continuance of their

same relative interests in the property transferred. The incorporation of a banking partnership cannot qualify, since under the laws of most states, as in the case of New York, the transferee bank would not be permitted to issue its stock except for cash, thus precluding an "exchange" within the section. In the case of nonbanking partnerships, the section is of limited application, for, even assuming that Section 112(b)(5) would prevail over Section 24(b) in cases falling within both sections, the remaining requirements involving the retention of control and the continuance of the same relative interests would in many instances be impossible to meet.

As a matter of statutory construction, therefore, it would seem crystal clear that "individual" does not include a partnership. Nor is there anything in the legislative history evidencing a different intention.

POINT II

The Court below erred in holding that the legislative history of Section 24(b)(1)(B) shows that the word "individual" was intended to include a partnership, when the legislative history indicates quite the contrary.

The Court below, in assuming that *any* transaction within the general field of the legislation must necessarily be within its terms, and in rejecting any need for fine differentiation (R. 263a-265a), clearly misread both the statute and the legislative history. The statute does not purport to reach all transactions in which there is a "near-identity of economic interests". In *McWilliams* v. *Commissioner*, 331 U. S. 694 (1947), this Court stated (p. 699) that the prohibition of Section 24(b) applies to sales between members of "certain designated groups", adding that the one common characteristic of these groups is that their members "generally have a near-identity of economic interests." Certainly this does not justify the inference, which Judge

Clark indulged in, that the existence of a near-identity of economic interests brings within the designated groups a relationship which otherwise is not within the section. The statute does not reach, for example, sales between two corporations with common ownership, unless one of the corporations is a personal holding company. It does not reach sales between partnerships having partners in common nor between an individual and a partnership of which the individual is a member.[2] On the contrary the statute designates with almost algebraic precision the specific classes of relationships within which losses on sales are disallowed. That this was the deliberate purpose of the Committee on Ways and Means is shown clearly by its Report, 75th Cong., 1st Sess., H. R. Rep. No. 1546, pp. 26, 27, 28. After reciting certain precise relationships falling within and without the section, the Report states (p. 28):

> "It will be observed from the foregoing table that the amendments made by Section 301 (a) and (b) do not reach all possible situations in which, due to family relationships or friendly control, artificial losses might be created for tax purposes."

This being the case, when Congress failed to specify a partnership, it would seem quite evident that the inclusion of a partnership was not intended.

The Court below thought that to hold the present transfer beyond the scope of Section 24(b) "would leave untouched the more spectacular cases which the investigation of the Senate Committee on Banking and Currency had brought to public attention", citing *Commissioner* v. *Lamont,* 156 F. (2d) 800 (C. C. A. 2d, 1946) (R. 263a).

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[2] There is of course a valid reason for excluding from Section 24(b) transactions involving partnerships and corporations. Assets devoted to a business purpose cannot be transferred from one business entity to another for the purpose of establishing tax losses without incurring other serious business and tax consequences.

Neither the Senate Banking Committee investigation nor the *Lamont* case justify any such conclusion. The only *partnership* question which had provoked the interest of the Senate Banking Committee was whether the existing rule permitting a partnership net capital loss to be used as an offset against the individual capital gains of the partners did not result in an unwarranted loss of revenue. Following the investigation, in 1934 the revenue laws were amended, and in the *Lamont* case (involving 1937) Judge Clark held that under the amendment partnership losses could be used to offset partnership gains plus $2,000 and no more, thus recognizing the allowance of the losses but limiting their use within the partnership. In 1938 the law again was changed, and the deduction restored to the partner, so that in 1940, the year we are concerned with, the only partnership question which had provoked the interest of the Senate Banking Committee had ceased to have any significance. Even under the *Lamont* case, the partnership losses were allowed and used within the partnership to offset partnership gains, while we are concerned here with the question whether partnership losses are allowable *at all*—a wholly different question. In drawing upon the Senate Banking Committee hearings to support its interpretation of Section 24(b), the Court below completely misconceived the scope and direction of such hearings. Throughout the Senate Banking Committee hearings, the Senate Banking Committee Report and the Ways and Means Committee hearings on the 1934 amendment underlying the *Lamont* case, and indeed, in the Committee hearings and reports involving Section 24(b), *there is not a single instance cited or discussed which would indicate that Congress was interested in or considering the disallowance of a loss sustained on a sale by or to a partnership.*

The Ways and Means Committee was deliberating upon the amendments underlying the *Lamont* case and upon Section 24(b) on the very same days. In the Committee reports dealing with the *Lamont* amendments we find a clear indication of how Congress looked at a partnership for tax purposes. In discussing the *Lamont* case amend-

ments, Congressman Hill, Chairman of the Subcommittee of the Ways and Means Committee, expressed the view that a partnership in "strict sense is not a legal entity, but it is as a matter of fact a business set-up, separate and apart from each individual partner associated in the partnership."[3] The Committee thereupon returned to the discussion of Section 24(b), and under questioning by Congressman Vinson directed at "transactions in the family" the Treasury indicated its approval of the Subcommittee's proposal.[4] (Id. pp. 113-114.)

It is useless to argue, as the Court below argued, that the decision of the Tax Court leaves "a loophole almost as large as the one it [Congress] was trying to close" (R. 262a) and "would substantially emasculate the legislative prohibition" (R. 269a). It is plain from the Committee reports that Congress intended to exclude from the statutory coverage many relationships where near-identity of economic interests existed. See p. 14, *supra.* As to these cases, the losses would still be disallowed when, in the language of the House Committee Report, "the transaction lacks the elements of good faith or finality, generally characterizing sales and exchanges of property." Indeed the Commissioner has ready at hand the decision of this Court in *Higgins* v. *Smith,* 308 U. S. 473 (1940), wherein a sale by a stockholder to his "controlled corporation" made prior to the enactment of Section 24(b) was disallowed because the sale was not of sufficient substance "finally to determine a loss."

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[3] Hearings before the Committee on Ways and Means, "Revenue Revision, 1934," 73d Cong., 2d Sess., p. 109.

[4] It is highly significant, we suggest, that the Chairman of the Subcommittee of the Ways and Means Committee which drafted the original 1934 text of what is now Section 24(b) as well as the 1934 amendments involved in the *Lamont* case, and who was manager on the part of the House and signed the subcommittee report and the conference report relating to both aspects of this legislation, was the Honorable Sam B. Hill, who is now a member of the Tax Court and concurred in the decision of the Tax Court.

POINT III

The Court below erred in applying to a modern partnership under the Uniform Partnership Act the now outmoded theory of the common law that partners own the assets of the firm individually, as in the case of joint owners who are not partners.

In holding that a partnership was a mere aggregation of individuals owning *as individuals* the partnership's assets, the Court below departed from the decisions of this Court in *Case* v. *Beauregard* and *Blodgett* v. *Silberman* (*supra*, p. 7), and repudiated even its own prior decision in *Commissioner* v. *Lehman* (*supra*, p. 5).[5] This result, it says, is compelled by the provisions of the New York Partnership Law, a plainly erroneous conclusion.

Section 50 of the New York Partnership Law states that the rights of a partner are "(a) his rights in specific partnership property, (b) his interest in the partnership, and (c) his right to participate in the management". But his right in specific partnership property, as Section 51 clearly shows, is exercisable solely "for partnership purposes", is "not assignable except in connection with the assignment of the rights of all the partners in the same property", is "not subject to attachment or execution, except on a claim against the partnership", on death "vests in the surviving partner or partners", and is not "subject to dower, curtesy, or allowances to widows, heirs, or next of kin". The effect of these provisions is to reduce the partner's interest, as

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[5] As early as 1928 the Board of Tax Appeals, following the *Beauregard* and *Silberman* cases, adopted the view that a partnership is to be regarded as a unit separate and distinct from the individual partners, and it consistently has applied this principle in a variety of situations ever since. See, e.g., *Harris* v. *Commissioner*, 11 B. T. A. 871, 874-5 (1928), aff'd 39 F. (2d) 540; *Wilson* v. *Commissioner*, 16 B. T. A. 1280, 1287 (1929); *Humphrey* v. *Commissioner*, 32 B. T. A. 280, 283 (1935); *Ford* v. *Commissioner*, 6 T. C. 499, 501 (1946); *Lehman* v. *Commissioner*, 7 T. C. 1088 (1946).

this Court said in the *Silberman* case, to what is little more than a "chose in action", or as Judge Learned Hand expressed it at greater length in the *Lehman* case (165 F. (2d) 385):

> "The practical effect of these interpolations into the common law was to impound firm assets and deprive the individual partners of any control over them except in so far as they were dealing with them on behalf of the firm as a unit. The individual partner's beneficial interests as a legal joint owner were trimmed down so that he had nothing left save that the firm assets should be devoted to the firm business, that he should share in any profits they produced and in the surplus upon winding up, whether voluntary or by legal process."

While a partner is a co-owner of the partnership assets, holding as a "tenant-in-partnership", the rights of the partners in such assets are now so far cut down and circumscribed that they have no resemblance at all to individual ownership. A sale of assets dedicated to the partnership enterprise and made for partnership purposes surely is not that kind of sale which may be characterized as a sale by "an individual", particularly when every consideration bearing upon the question shows that it was not the intention of Congress to do so, as the Tax Court unanimously found.

POINT IV

The Court below erred in reversing the unanimous decision of the Tax Court when such decision had warrant in the record and a reasonable basis in law.

In *Dobson* v. *Commissioner* (*supra*, p. 6), this Court held that "the judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." This principle, based as it is upon the weight to be given to the expert opinion of the Tax Court, could hardly be more plainly demonstrated than in the present case. Here all 16 judges of the Tax

Court concurred in the conclusion that the term "individual" did not include a partnership. Surely there was a rational basis for this conclusion, and the Court below was plainly in error in substituting its views for the expert opinion of the Tax Court. In *Commissioner* v. *Estate of Bedford*, 325 U. S. 283, 292 (1945), this Court said:

> "As is true of other teasing questions of construction raised by technical provisions of Revenue Acts the matter is not wholly free from doubt. But these doubts would have to be stronger than they are to displace the informed views of the Tax Court."

In *Labor Board* v. *Hearst Publications*, 322 U. S. 111 (1944), this Court, in construing the word "employee" as it appeared in the National Labor Relations Act, said (p. 131):

> "• • • where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited. • • • the Board's determination that specified persons are 'employees' under this Act is to be accepted if it has 'warrant in the record' and a reasonable basis in law."

CONCLUSION

The Court of Appeals' decision reversing the Tax Court is in conflict with applicable decisions of this Court, attributes unwarranted discriminatory intent to Section 24(b) of the Internal Revenue Code, and raises questions of continuing public importance in the administration of Federal tax law. Writs of certiorari to review it should therefore be granted.

Respectfully submitted,

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New York, N. Y., October 28, 1948.

APPENDIX

Section 24(b) of the Internal Revenue Code as applicable in 1940 provides as follows:

"(1) LOSSES DISALLOWED.—In computing net income no deduction shall in any case be allowed in respect of losses from sales or exchanges of property, directly or indirectly—

(A) Between members of a family, as defined in paragraph (2)(D);

(B) Except in the case of distributions in liquidation, between an individual and a corporation more than 50 per centum in value of the outstanding stock of which is owned, directly or indirectly, by or for such individual;

(C) Except in the case of distributions in liquidation, between two corporations more than 50 per centum in value of the outstanding stock of each of which is owned, directly or indirectly, by or for the same individual, if either one of such corporations, with respect to the taxable year of the corporation preceding the date of the sale or exchange was, under the law applicable to such taxable year, a personal holding company or a foreign personal holding company;

(D) Between a grantor and a fiduciary of any trust;

(E) Between the fiduciary of a trust and the fiduciary of another trust, if the same person is a grantor with respect to each trust; or

(F) Between a fiduciary of a trust and a beneficiary of such trust.

(2) STOCK OWNERSHIP, FAMILY, AND PARTNERSHIP RULE.—For the purposes of determining, in applying paragraph (1), the ownership of stock—

(A) Stock owned, directly or indirectly, by or for a corporation, partnership, estate, or trust, shall be considered as being owned proportionately by or for its shareholders, partners, or beneficiaries;

(B) An individual shall be considered as owning the stock owned, directly or indirectly, by or for his family;

(C) An individual owning (otherwise than by the application of subparagraph (B)) any stock in a corporation shall be considered as owning the stock owned, directly or indirectly, by or for his partner;

(D) The family of an individual shall include only his brothers and sisters (whether by the whole or half blood), spouse, ancestors, and lineal descendants; and

(E) CONSTRUCTIVE OWNERSHIP AS ACTUAL OWNERSHIP.—Stock constructively owned by a person by reason of the application of subparagraph (A) shall, for the purpose of applying subparagraph (A), (B), or (C), be treated as actually owned by such person, but stock constructively owned by an individual by reason of the application of subparagraph (B) or (C) shall not be treated as owned by him for the purpose of again applying either of such subparagraphs in order to make another the constructive owner of such stock."

Section 182 of the Internal Revenue Code as applicable in 1940 provides as follows:

"In computing the net income of each partner, he shall include, whether or not distribution is made to him—

(a) As a part of his short-term capital gains or losses, his distributive share of the net short-term capital gain or loss of the partnership.

(b) As a part of his long-term capital gains or losses, his distributive share of the net long-term capital gain or loss of the partnership.

(c) His distributive share of the ordinary net income or the ordinary net loss of the partnership, computed as provided in section 183(b)."